(2)

No. 89-246

In the Supreme Court of the United States

OCTOBER TERM, 1989

ARNOLD SQUITTIERI AND ALPHONSE SISCA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

22 pp

QUESTIONS PRESENTED

1. Whether the district court should have excluded "other crimes" evidence.

2. Whether the district court applied the wrong standard in determining that certain tape-recorded evidence satisfied the authentication requirement of Fed. R. Evid. 901(a).

3. Whether the district court erred in admitting expert testimony on the meaning of certain recorded conversations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-246

ARNOLD SQUITTIERI AND ALPHONSE SISCA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals affirming petitioners' convictions, Pet. App. 1a-3a, is unpublished, but the judgment is noted at 879 F.2d 861 (Table). The opinion and order of the district court denying the motion to suppress is reported at 688 F. Supp. 163. The opinions of the district court admitting other crimes evidence, Pet. App. 4a-7a, and evidence of tape recordings, Pet. App. 8a-17a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1989. The petition for a writ of certiorari was

filed on August 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the District of New Jersey convicted petitioners on one count of conspiracy to distribute and to possess with intent to distribute heroin, in violation of 21 U.S.C. 846, and one count of distribution of heroin, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioners to concurrent terms of 17 years' imprisonment on each count and to six years' special parole on the distribution count. It also fined each petitioner a total of $100,000. The court of appeals summarily affirmed.

Petitioners were members of a heroin distribution operation headed by Angelo Ruggiero and others from September 1981 to June 1982. At trial, the government introduced evidence from two independent sources to prove the conspiracy and distribution. First, it introduced tapes of court-ordered electronic surveillance of Ruggiero's home and telephone. Second, it offered the testimony of Richard Pasqua, who declared that he had purchased a kilogram of heroin from petitioners in June 1982.

1. At trial, the government played recordings of 33 telephone conversations that were overhead on Ruggiero's telephone and an additional nine conversations that were overheard on a listening device in Ruggiero's home. The recorded telephone conversations established that petitioners were partners, that they were associated with John Gotti, that they were in some kind of business with Ruggiero that they would not discuss on the telephone, and that petitioners were frequently referred to by nicknames—"Zeke" for Squittieri and "Funzi" for Sisca. Gov't C.A. Br. 6-8. The recordings, as well as physical surveil-

lance evidence, showed that a focal point of petitioners' business with Ruggiero was the Patio Deli in Queens, New York, and that their dealings also involved John Carneglia, a partner of Ruggiero. *Id.* at 9-10. The conversations overheard in Ruggiero's home showed that the business involved heroin and that Ruggiero and Gotti were concerned about whether they should give petitioners heroin on consignment or demand the money for it on delivery. *Id.* at 10-16.

2. Richard Pasqua testified that he had known petitioners since childhood and was particularly close to petitioner Sisca. Both Pasqua and Sisca were incarcerated in the federal prison at Lewisburg, Pennsylvania, during late 1980 and early 1981. At that time, Pasqua testified, Sisca spoke to him frequently about heroin. Sisca told Pasqua that he planned to associate with John Gotti and Angelo Ruggiero when he was released from prison and that he intended to become the biggest drug dealer in New York. Pasqua told Sisca that he, too, planned to go into the heroin business. Pasqua and Sisca were both released on parole in the summer of 1981. Gov't C.A. Br. 17-18; C.A. Supp. App. 321-336.

When Pasqua's mother died in October 1981, petitioners went to the vigil. While they were there, they spoke to Pasqua about buying heroin from him, since they had heard he was in the business and doing well. Sisca also conveyed the condolences of John Gotti and Angelo Ruggiero, and he said he could get money from Gotti to buy heroin. Pasqua replied that he and his partner were waiting for a shipment and that he would like to buy some in the meantime. Petitioners agreed to sell Pasqua one kilogram of heroin for $180,000. The sale took place the following Monday. Gov't C.A. Br. 18-20; C.A. Supp. App. 339, 342-361.

Pasqua did not see petitioners again until June 1982, when he once again needed an alternate source of heroin. At that time, Pasqua met with petitioners and they agreed to sell him one kilogram of heroin for the same price as before, $180,000. At a subsequent meeting at which Pasqua was to make a payment, Angelo Ruggiero accompanied petitioners. Ruggiero told Pasqua that he should return the heroin if he was having trouble selling it, and he suggested the name of someone who could help him sell the drugs. Gov't C.A. Br. 20-22; C.A. Supp. App. 365-378, 407-418.

ARGUMENT

1. Petitioners claim that the district court erred by admitting "other crimes" evidence, which is inadmissible if it is offered to prove criminal propensity. Fed. R. Evid. 404(b); Pet. 8-15. The other crimes evidence consisted of proof of petitioner Sisca's 1973 conviction for conspiracy to distribute narcotics and testimony about a 1968 sale to petitioners of a trailer load of stolen quinine, a substance used to dilute heroin.

a. Petitioner Sisca's 1973 narcotics conviction was plainly admissible to prove Sisca's intent in dealing with Ruggiero and Carneglia and his knowledge that they were in the business of distributing heroin. The issues of intent and knowledge were clearly in dispute. Sisca's counsel in his opening statement admitted that Sisca was friendly with Ruggiero but contended that he was not engaged with him in heroin distribution. Counsel argued that "you cannot taint by mere association." C.A. Supp. App. 436. In his summation, Sisca's counsel expanded upon that theme. He argued that "[Sisca] is now a perfect subject to this prosecution because he called Angelo Ruggiero, had something to do with him. But you must be satisfied

beyond a reasonable doubt that that something to do with him was the transaction involving narcotics." *Id.* at 281-282. Counsel then concluded his summation by arguing: "They've brought you a suggestion. They've brought you an association. They don't like my client's relationships, but they certainly have not proven that my client was involved in narcotics transaction." *Id.* at 283.

Cases like this one—where a defendant concedes presence but insists that there is an innocent explanation for his conduct—are paradigm instances in which "other crimes" evidence is admissible to show intent and knowledge. Petitioners claim that Sisca's intent and knowledge were not at issue because Sisca's trial counsel "offered to stipulate to intent and proposed a jury charge that would eliminate the issue." Pet. 9. But the proffered stipulation did not remove those issues from the case. As the colloquy made clear, C.A. App. 45-50, the stipulation related only to the issue of Sisca's intent in dealing with Pasqua; Sisca's counsel was willing to make that concession because Sisca denied he had ever sold heroin to Pasqua. The intent that Sisca's counsel was not willing to concede—and the issue to which the 1973 conviction was relevant—was Sisca's knowledge and intent in dealing with Ruggiero and Carneglia. Sisca admitted that he had associated with Ruggiero, but he claimed legitimate business dealings as the explanation for their meetings. As the district court explained in its lengthy ruling allowing the admission of the evidence regarding the 1973 conviction:

> Through circumstantial evidence, the government intends to show that defendants met with Angelo Ruggiero and others at the Patio Deli on at least several occasions, and that the purpose of these meetings was to negotiate their narcotics transaction. * * *

> The defendants do not intend to deny that such meetings with Ruggiero and others never took place. Rather, they tend [*sic*] to offer proof that the nature of the meetings involved legitimate business dealings. Under Rule 404(b), evidence of prior bad acts which tend to undermine a defendant's innocent explanation for his act will be admitted. J. Weinstein and M. Berger, *Weinstein's Evidence*, Paragraph 404(12) at 404-84. Here, the government seeks to introduce evidence of Sisca's 1973 heroin conviction and testimony regarding the alleged 1968 sale of stolen quinine to the defendants for precisely the purpose of undermining their innocent explanation for their meetings at the Patio Deli with Ruggiero.

Pet. App. 6a. The district court's decision to admit the evidence was thus well within its discretion.

The incompleteness of the stipulation proposed by Sisca's counsel belies petitioner's claim his 1973 conviction would not have been admissible if he had been tried in the Second Circuit rather than the Third Circuit. In *United States* v. *Figueroa*, 618 F.2d 934 (1980), the Second Circuit held that it was error to admit prior crimes evidence because the defendant had removed the issue of intent from the case. The defendant there had claimed that the testimony implicating him in a narcotics transaction was entirely fabricated—that the entire drug transaction the government witness had recounted never occurred. A similar defense was involved in the other cases cited by petitioners.[1] In this case, in contrast, Sisca admitted his

---

[1] In *United States* v. *Ortiz*, 857 F.2d 900, 904-905 (2d Cir. 1988), cert. denied, 109 S. Ct. 1352 (1989), the court stated that intent is removed as a disputed issue only if the defendant argues that the charged conduct did not occur at all; in that case, the defendant's alternative argument of lack of intent made the admission of Rule

association with Ruggiero but maintained that it was innocent. Thus, the district court correctly admitted Sisca's 1973 narcotics conviction because it tended to show that Sisca knew of Ruggiero and Carneglia's heroin trafficking and that Sisca intended to participate in it, an issue that Sisca sharply disputed at trial. The district court's admission of other crimes evidence is therefore entirely consistent with case law in the Second Circuit. See, *e.g.*, *United States* v. *Ramirez-Amaya*, 812 F.2d 813, 817 (1987); *United States* v. *Martino*, 759 F.2d 998, 1005 (1985); *United States* v. *Williams*, 577 F.2d 188, 192, cert. denied, 439 U.S. 868 (1978). Cf., *e.g.*, *United States* v. *Zolicoffer*, 869 F.2d 771, 773 (3d Cir.), cert. denied, 109 S. Ct. 3172 (1989); *United States* v. *Dansker*, 537 F.2d 40, 58 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). This case therefore presents no occasion to consider the validity of the Third Circuit's rule that a defendant may not prevent the admission of other crimes evidence under Rule 404(b) merely by stipulating to the issue on which it would be relevant. *United States* v. *Schwartz*, 790 F.2d 1059, 1061 (1986). Whatever difference there may be among the circuits about how intent may be removed as an issue for purposes of Rule 404(b), that conflict is not implicated in this case, as the outcome here did not depend on any difference

---

404(b) evidence proper. In *United States* v. *Mohel*, 604 F.2d 748, 752 (2d Cir. 1979), as in *Figueroa*, the defense to a narcotics charge was that the alleged sale was a total fabrication. Similarly, the defendant in *United States* v. *Manafzadeh*, 592 F.2d 81, 89 (2d Cir. 1979), argued that he had had nothing to do with the creation of the fraudulent checks. The defense to a bribery charge in *United States* v. *O'Connor*, 580 F.2d 38, 41 (2d Cir. 1978), was that the defendant had never taken money or anything of value from any of the witnesses who said they had paid him. And in *United States* v. *Silva*, 580 F.2d 144, 148 (5th Cir. 1978), the sole defense was mistaken identity. In none of those cases was intent a contested issue at trial.

between the approaches employed by the Second and Third Circuits.[2]

b. Petitioner Squittieri claims that the 1968 quinine sale should not have been admitted against him because the evidence was insufficient to show that he was actually involved in that transaction. Pet. 14. But Squittieri never denies—and in fact there was no dispute—that Squittieri was present when the sale of quinine was negotiated between Sisca and Pasqua. Squittieri's presence was properly admitted as evidence of the parties' familiarity with one another and the basis for a relationship of trust between Pasqua and Squittieri. *United States* v. *Traitz*, 871 F.2d 368 (3d Cir. 1989); *United States* v. *Kalaydjian*, 784 F.2d 53, 56 n.3 (3d Cir. 1986). It was for this limited purpose that the district court admitted the 1968 quinine sale, and it was on this theory that the district court charged the jury. C.A. App. 886.

2. Petitioners claim that the district court erred in admitting tape recordings of intercepted conversations over their objection that the government failed properly to authenticate the recordings. Pet. 15-18. They contend that the courts of appeals are divided on the correct standard for authentication under Fed. R. Evid. 901(a), and that this Court should review this case to resolve the conflict.

[2] Petitioner Squittieri insists that he was prejudiced by the introduction of Sisca's prior conviction regardless of the district court's instruction to consider it only against Sisca, because Squittieri was consistently portrayed as Sisca's partner. Pet. 13-14. That claim lacks substance. The district court instructed the jury at least three times to consider Sisca's conviction against him alone, and it found that the evidence concerning the two was sufficiently compartmentalized that the jury would not be confused. Gov't C.A. Br. 36-37; C.A. Supp. App. 443. Moreover, there was no evidence that Squittieri had anything to do with the events giving rise to Sisca's 1973 conviction, nor was there any evidence that petitioners were partners before 1981. Gov't C.A. Br. 36-37.

Petitioners are incorrect in asserting that the courts of appeals have applied different standards in authenticating tape-recorded evidence. It is true that several circuits have held that the government must prove the authenticity of electronic surveillance evidence by "clear and convincing evidence."[3] For example, in *United States* v. *Fuentes*, 563 F.2d 527, cert. denied, 434 U.S. 959 (1977), the Second Circuit decided that because "recorded evidence is likely to have a strong impression upon a jury and is susceptible to alteration," the government must introduce "clear and convincing" evidence of authenticity as a foundation for the admission of such evidence. 563 F.2d at 532. Contrary to petitioner's contention, the Third Circuit also applies the "clear and convincing evidence" standard to the authentication of tape-recorded evidence. *United States* v. *Inadi*, 748 F.2d 812, 816 (1984), rev'd on other grounds, 475 U.S. 387 (1986); *United States* v. *Starks*, 515 F.2d 112, 121 (1975), aff'd in part and rev'd in part on other grounds 431 U.S. 651 (1977). Petitioners contend that the Third Circuit uses a more lenient standard, but that contention rests entirely on *United States* v. *Jackson*, 649 F.2d 967, 973, cert. denied, 454 U.S. 1034 (1981). As petitioners themselves acknowlege, Pet. 15-16, *Jackson* concerned the

[3] *E.g.*, *United States* v. *Alvarez*, 860 F.2d 801, 807 (1988), modified on other grounds, 868 F.2d 201 (7th Cir.), cert. denied, 109 S. Ct. 1966 (1989); *United States* v. *Vega*, 860 F.2d 779, 788 (7th Cir. 1988); *United States* v. *Zambrana*, 841 F.2d 1320, 1338-1339 (7th Cir. 1988); *United States* v. *Keck*, 773 F.2d 759, 766 (7th Cir. 1985); *United States* v. *Faurote*, 749 F.2d 40, 43 (7th Cir. 1984); *United States* v. *Balzano*, 687 F.2d 6, 8 (1st Cir. 1982); *United States* v. *Cortellesso*, 663 F.2d 361, 364 (1st Cir. 1981); *United States* v. *Mouton*, 617 F.2d 1379, 1383-1384 (9th Cir.), cert. denied, 449 U.S. 860 (1980); *United States* v. *Blakey*, 607 F.2d 779, 787 (7th Cir. 1979); *United States* v. *King*, 587 F.2d 956, 961 (9th Cir. 1978); *United States* v. *Knohl*, 379 F.2d 427 (2d Cir.), cert. denied, 389 U.S. 973 (1967).

standard for establishing the chain of custody for the admission of contraband; it does not speak to the supposedly more rigorous standard required for authenticating tape-recorded evidence. Thus, there is no conflict among the circuits on the precise issue presented here. Although the Third Circuit wrote no opinion in this case, petitioners presumably received the benefits of the Third Circuit's "clear and convincing evidence" standard when the Third Circuit reviewed their convictions, and the government's proof of authentication presumably was found to satisfy that standard.

While the courts of appeals have adopted a "clear and convincing evidence" standard, we submit that the proper test is the one indicated by Fed. R. Evid. 901(a)—whether the evidence was sufficient to support a finding by the jury that the tape recordings are authentic. That was, in essence, the standard applied by the district court in this case, Pet. App. 11a, and we believe that that standard, rather than the "clear and convincing evidence" standard, correctly applies the Rules of Evidence to the authentication question at issue here.

The "clear and convincing evidence" standard originated in *United States* v. *Knohl*, 379 F.2d 427 (2d Cir. 1967), a case decided before the Federal Rules of Evidence were adopted in 1975. Those cases that have applied the "clear and convincing evidence" standard since the Federal Rules of Evidence became effective have not cited or analyzed Rule 901(a). That rule, which governs questions of authentication, provides that evidence may be admitted if the evidence is "sufficient to support a finding that the matter in question is what its proponent claims." The standard set forth in Rule 901(a) requires only that the court conclude that the jury could find by a preponderance of the evidence that the evidence is authentic. See 5 J. Weinstein & M. Berger, *Weinstein's Evidence*

¶ 901(a)[01], at 901-17 to 901-18 & n.8 (1989). Because authentication questions under Rule 901(a) present issues of conditional relevance, Rule 901(a) rulings are governed by the procedure set forth in Rule 104(b). See Notes of Advisory Committee to Rule 901, 28 U.S.C. App. at 737. Rule 104(b), in turn, provides that a court must admit conditionally relevant evidence if the jury could find the condition satisfied by a preponderance of the evidence. This Court made that point clear recently in *Huddleston* v. *United States*, 108 S. Ct. 1496 (1988):

> In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact * * * by a preponderance of the evidence.

Id. at 1501. Accordingly, the interaction of Rules 901(a) and 104(b) make it plain that the "clear and convincing evidence" standard has no role to play in deciding questions of authentication under the Federal Rules of Evidence.

Because the courts that have employed the "clear and convincing evidence" standard have not adverted to Rule 901(a) or the "preponderance" standard that this Court in *Huddleston* held applicable to issues of conditional relevance, review of the question presented in this case would be premature at this time. Before the issue becomes ripe for this Court's review, the courts of appeals should be given the opportunity to reconsider the standard of proof required to authenticate tape-recorded evidence in light of Rule 901(a) and this Court's decision in *Huddleston*.

In addition, it is doubtful that a difference in the standard of proof would produce different outcomes in many cases. Of the many reported cases in which tape-recorded evidence was offered against a challenge to its authenticity, virtually none have rejected the admission of the evidence, regardless of the test employed.[4] Thus it appears to make little or no difference what standard is used to test the quality of the authentication. There are so few cases in which authentication is truly disputed that the standard applied to the inquiry is seldom more than an academic concern.

This case provides a good illustration of the unimportance of the standard used in making authentication rulings, for even if the district court had applied the "clear and convincing evidence" standard here, the government's proof plainly would have satisfied that test. The government presented substantial evidence concerning the chain of custody of the tapes, offering testimony with respect to every significant link in the chain. Agent Noon, one of the monitoring agents, testified that he personally saw that the tapes were safely transported to the Brooklyn-Queens office of the FBI, where the tapes were logged in, placed in

---

[4] See, *e.g.*, *United States* v. *Alvarez*, 860 F.2d at 808-809; *United States* v. *Vega*, 860 F.2d at 791-792; *United States* v. *Lance*, 853 F.2d 1177, 1181-1182 (5th Cir. 1988); *United States* v. *O'Connell*, 841 F.2d 1408, 1419-1422 (8th Cir.), cert. denied, 108 S. Ct. 2857 (1988); *United States* v. *Lively*, 803 F.2d 1124, 1129 (11th Cir. 1986); *United States* v. *Carbone*, 798 F.2d 21 (1st Cir. 1986); *United States* v. *Cook*, 794 F.2d 561, 567-568 (10th Cir.), cert. denied, 479 U.S. 889 (1986); *United States* v. *Risken*, 788 F.2d 1361, 1369-1370 (8th Cir.), cert. denied, 479 U.S. 923 (1986); *United States* v. *Sarro*, 742 F.2d 1286, 1292 (11th Cir. 1984); *United States* v. *Panas*, 738 F.2d 278, 286 (8th Cir. 1984); *United States* v. *Brown*, 692 F.2d 345, 350 (5th Cir. 1982); *United States* v. *Sutherland*, 656 F.2d 1181, 1200-1201 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982) (error to find sufficiently authenticated but harmless).

custody envelopes, and then locked in a cabinet. Pet. App. 13a-14a. Agent Ticano testified that he would unlock the cabinet at 5 a.m. each weekday and accept formal custody of the tapes, completing in each case an administrative review to ensure that the tapes were properly labeled, dated, signed by the monitoring agents, and placed in the appropriate custody envelopes. Agent Ticano would then deposit the tapes in a locked filing cabinet in the supervising agent's office; Ticano was the only person with a key to that cabinet. *Id.* at 14a. The tapes remained in the locked filing cabinet until the case agent, Agent McCormick, took them to court for sealing. *Ibid.*; Gov't C.A. Br. 46-47.

The only deviation from this practice was for a few of the tapes obtained from the "bug" in Ruggiero's home, which were sent to the FBI office in New York for enhancement. The audio technician who performed the enhancement testified that the tapes were maintained in a locked cabinet in the audio laboratory; only two technicians and their supervisor had keys. Pet. App. 14a-16a. After the technicians enhanced the tapes, they were released to the custody of another FBI agent who transported them back to the Brooklyn-Queens office. Agent Ticano would then accept custody of the tapes and redeposit them in the locked cabinet. *Id.* at 16a.

Petitioners argue that there were gaps in the chain and flaws in some of the safekeeping procedures, particularly for the tapes that were sent to the audio lab for enhancement. Pet. 17-18. And they cite the district court's remarks about the less than exemplary handling of the Ruggiero tapes. Pet. App. 15a. However, the flaws they complain of pertain primarily to only a small number of the "bug" tapes out of the 33 telephone recordings and 9 "bug" recordings. Moreover, the district court found that any gaps in the chain of custody were not legally significant, and it

noted that the law does not require a flawless chain of custody in order to establish authenticity. The evidence submitted in this case was thus sufficient to satisfy both the "preponderance" and the "clear and convincing evidence" standards.

3. Finally, petitioners challenge the district court's admission of expert testimony, claiming that it went far beyond the established standards for the admission of such evidence in narcotics cases. Pet. 19-22.

The expert witness was Drug Enforcement Agent Gerald Franciosa, a 19-year veteran in drug enforcement, who spent 11 years as an undercover agent investigating Italian heroin traffickers in New York. He testified about eight of the "bug" conversations and certain records that were seized upon the arrest of Salvatore Greco when he delivered two kilograms of heroin for Ruggiero to William Cestaro. See Gov't C.A. Br. 16-17, 53. Before Franciosa took the stand, the district court ruled that he could explain some of the terms used by the speakers and relate one conversation to another, but that he could not give any opinions based on the conversations as a whole. C.A. App. 685-689.

Petitioners contend that the expert repeatedly exceeded the proper bounds of expert testimony and that he commented at length about clearly worded and uncoded conversations that the jurors could interpret for themselves. The district court, however, disagreed. As the testimony proceeded, the district court noted that the witness properly remained within the parameters the court had set. C.A. App. 731-732. At bottom, therefore, petitioners' argument is no more than a disagreement with the factual determination by the district court that the scope of the expert's testimony did not exceed the legal bounds established under the rules of evidence. Petitioners claim no conflict

among the courts of appeals on the question of what those standards are.

In any event, petitioners did not properly preserve their objection on this ground at trial. Trial counsel never objected that the expert was improperly testifying about clear statements; rather, the objections that were made were on the ground that the expert was "speculating" about the meaning of the phrases. C.A. App. 731; see Gov't C.A. Br. 53-54. That trial counsel's contemporaneous objection to the expert's testimony was that the expert was speculating about the meaning of some words and phrases strongly suggests that the meaning of the terms on the tapes was not apparent. Petitioners are now seeking to reverse field and claim that the expert was improperly allowed to comment on clear statements. A brief review of the conversations about which Franciosa testified confirms that the conversations were not straightforward and that the expert's testimony could certainly have been helpful to the jury. C.A. Supp. App. 198-277. The admission of this testimony was therefore well within the wide latitude afforded to the district court to admit expert testimony under Fed. R. Evid. 702. See *United States* v. *Nersesian*, 824 F.2d 1294, 1308 (2d Cir.), cert. denied, 108 S. Ct. 355 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
KATHLEEN A. FELTON
Attorney

OCTOBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00549